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of Thailand**

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Abstract

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Keywords

experience, intellectual, trade, property, negotiations, transparency, thailand

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Intellectual Property and Transparency in Trade Negotiations: The Experience of Thailand

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This article concentrates on the problem of non-transparency in non-multilateral norm-setting activities in the intellectual property field. It highlights the experience of Thailand in order to show the inability of the general public to participate in decision-making relating to trade negotiations and to access information regarding trade agreements. It explores the issue of transparency in this international norm-setting process that will support the debate on development-oriented policy in order to better understand the socio-economic impacts of trade liberalization.

Keywords: Transnational Corporations, Globe Trade Liberalization, FTA, WIPO, Generalized System of Preferences, Trans-Pacific Partnership Agreement, compulsory licence, trade negotiations

Beneficiary of Global Trade Liberalization

One of the most important developments in the second half of the 20th century, especially after the Second World War, has been the rapid and extensive internationalization of economic activity. This has been most marked by the rapid growth of transnational corporations (TNCs), along with increase in trade and foreign direct investment.¹ The TNCs play an important role in the development and use of natural resources, transfer of technology, mobilization of financial resources and the industrialization process in countries around the world. Everyone is affected by activities of the TNCs. In supermarkets, chain stores or village shops in every corner of the globe, it is their products that dominate the world. The global firms directly and indirectly control the lives and livelihood of people, ranging from people who live near or work in their factories, to the farmer who buys their seeds and fertilizers and sell their produce to the agricultural firms.²

Since 1970s, the process of globalization and increased trade has accelerated the domination by TNCs over the lives of people around the world.³ The globalization has turned a country into the market-based economy where the market has a significant influence over the government and where the state has lost its regulatory power and control of business and the market. International trade rules brought about by

the World Trade Organization (WTO) and bilateral and regional Free Trade Agreements (FTAs) are based on a process of exchange embodying minimum standards of treatment. The government is prohibited from interfering with private economic activities, and is required to remove its policies that affect cross-border trade. For example, the European Union has been negotiating a free trade agreement with India. The successful negotiations will make India substantially reduced its tariffs of 150% levied on imported whisky.⁴ The tariff reduction will likely increase alcohol imports and consumption in India but undermine public health policy goals the country intends to achieve.

Developed nations can force the negative consequences of their domestic policies on another through the multilateral rule-making process of the WTO and, in specific areas the World Intellectual Property Organisation (WIPO) and others. The international economic order established through the multilateral process has brought substantial economic benefits to industrialized nations. For example, it was estimated that if the WTO/TRIPS obligations for intellectual property (IP) protection were fully implemented, annual transfers of funds to major technology-exporting countries in the form of royalties and licensing fees would increase to more than US\$ 20 billion.⁵ This clearly reflects that developed economies stand to make significant gains from open trade more than developing countries.

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The trade liberalization leads to a significant decline in the capacity of the nation-state to regulate in the public interest.⁶ Various trade agreements are generally negotiated by governments' politicians and bureaucrats but represent the demands of the TNCs. The multilateral agreements, through the WTO, covers a broad range of areas and topics, including trade in goods and services, investment, government procurement, labour and environmental standards, and protection of IP rights. While trade negotiations are focused on establishing a set of rules to protect corporate interests, they do not address the public concerns in regards to the protection of environment, human rights, public health and safety, etc. Domestic laws and government measures aimed to protect and promote the public interest are generally considered barriers to trade, which must be eliminated or decreased. In addition, governments around the world have been required to implement laws that provide high level of protection for corporate-owned IP rights. The successful lobbying campaign of US pharmaceutical industry to impose on other countries, through trade negotiations and/or unilateral trade sanctions, a strict patent regime for pharmaceuticals that has a profoundly negative impact on the access to medicines of people is a case in point.⁷

In the late 1980s, a number of countries, including Taiwan, Korea, India, Thailand and Indonesia, were placed under tremendous pressure by the world's largest trading bloc led by the United States whom they were unable to withstand. The developed economies exerted bilateral pressure, by withdrawing or threatening to withdraw trade privileges they gave to developing countries under the Generalized System of Preferences (GSP). The developed countries also threatened to impose trade sanctions on the countries that failed to provide adequate and effective IP protection. Because of this pressure, those developing countries decided to revise their IP laws even before the Uruguay Round of multilateral trade negotiations was concluded.

When a country's government has decided that it wishes to apply for membership of WTO, it has to make a large number of commitments. Accession to the WTO involves a complex technical process and negotiations with existing members. The country has to adopt domestic laws and regulations to implement WTO obligations, even before the final accession terms and commitments are presented to the WTO body for a vote. Most developing countries face

special difficulties in completing their accession process.⁸ The case of Vietnam's bid for accession to the WTO is a good example of the challenges a developing country faces when it seeks to become a WTO member.

Prior to becoming a member of the WTO in 2007, Vietnam foresaw the benefit of becoming a member, in terms of a chance to enjoy the MFN treatment, access to the dispute settlement mechanism, and establishment of a suitable investment climate that attracts TNCs. During the accession process, Vietnam was under great pressure to accept all sorts of commitments. It had to enter separate bilateral negotiations with some key WTO members, such as the European Union, the United States, Australia and Japan. Those countries had put in a request for a number of concessions from Vietnam in exchange with their support for its application. For example, Vietnam was asked not to use the safeguard provisions on agricultural goods in case when there was an import surge that may undermine the domestic market. It was required to provide patent protection for pharmaceuticals, and to expand copyright protection to audio-visuals, prior to its WTO accession. It was pressured to make available IP protection that is not required by the WTO/TRIPS Agreement, such as providing data exclusivity (i.e. protection of clinical trial data, submitted with a new drug application, against use by either drug regulatory authorities or other companies). Some WTO member requested Vietnam to provide them with draft legislation on protection of geographical indications. Some countries required Vietnam to join the Patent Co-operation Treaty (PCT) in exchange for their support for Vietnam's accession.⁹

Apart from the multilateral level, bilateral and regional trade deals can restrict a country's ability to use the relevant policy space to implement its national development policies. In recent times, the United States and the European Union have launched their negotiation campaigns for an FTA with certain countries. The countries that have signed or are in the process of negotiation of a bilateral and regional trade agreements with two of the world's economic superpowers include Australia, the Andean Community countries, Bahrain, the Central American countries, Chile, India, Jordan, Morocco, Panama, Singapore, Southern African countries, Thailand, Vietnam, etc. Larger economies like China and Japan are also engaged in negotiating free trade agreements

with their trading partners. China, the world's second largest economy, is working toward an FTA with ASEAN (called ASEAN+3). Japan has so far concluded an FTA with Indonesia, Malaysia, Mexico, Philippines, Singapore, and Thailand. Negotiations for an FTA are also underway among Australia, Chile, India, Japan and South Korea.

One of the most significant free trade agreements is the Trans-Pacific Partnership (TPP) Agreement. The TPP Agreement is currently being negotiated by 12 nations, including Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. It is expected to be concluded by the end of 2014. When concluded, the TPP Agreement will tie together the Pacific's largest economies and will set standards of trade measures that cover a broad range of traditional and non-traditional trade and investment issues, such as local-content requirements in government contracts, higher standards of IP protection, the roles of state enterprises, liberalization of telecommunications, labour and environment standards and e-commerce. The TPP Agreement is expected to be the world's highest standard agreement and perhaps will become the most important trade agreement in the 21st century. Due to its rule that allows for membership expansion, the Agreement will create the largest and most important trading bloc which includes many of the Pacific's largest economies such as, the United States, Japan, Canada, Australia, Singapore and perhaps China.

From the perspective of the negotiating countries, the signing of non-multilateral trade agreements is the crucial economic factor for creating growth, efficiency and stability in their economy. A unified and borderless economic entity will present greater business challenges and opportunities for enterprises and investors of the signatory countries. It will also give exporters and investors from those countries greater access to lucrative integrated markets. However, it has been argued that the benefits derived from the trade agreements seems unbalanced, due to the fact that such agreements are negotiated by parties of unequal bargaining power. The power asymmetry is likely to influence the bargaining outcomes and will lead to unequal distribution of benefits causing unfairness and inequity in trading relations.¹⁰

International Intellectual Property Protection and Trade Liberalization: Lessons from Thailand

Thailand is one of 160 countries that are currently members of WTO. There were several policy reasons

for Thailand to join the multilateral trade organization. First, accession to the WTO would enhance trade security, transparency, and predictability under WTO rules. Since, the Thai economy is heavily dependent on exports, it was believed that Thailand's exported products would benefit from the multilateral rules which oblige member countries to reduce custom duty and tariffs on an equal basis under the Most-Favoured-Nation (MFN) and the National Treatment (NT) principles. Secondly, as a WTO member, Thailand would be in a better position to seek the best possible negotiation on trade-related issues in its own interests. It would have an opportunity to participate in negotiations for international rules relating to health, quality, safety, or environmental standards under WTO Agreements, such as, Agreement on Technical Barriers to Trade (TBT) and Agreement on Sanitary and Phytosanitary Measures (SPS), which would guarantee continued access to foreign export markets. Thirdly, the WTO membership would create new trade and investment opportunities for Thailand, and would strengthen multilateral trade collaborations with other countries.

Contrary to industrial and government belief regarding the perceived benefits of free trade, there is widespread scepticism amongst consumer and civic groups in Thailand over its adverse consequences. The civil society believes that trade liberalization is politically driven. They claim that accession to the WTO and signing free trade agreements could have constraining effects on Thailand's policy space for industrial development. It would also increase administrative burdens, restricting domestic regulatory policies, etc. As far as trade in goods is concerned, Thailand, being a member of the WTO, has commitments to gradually reduce the tariff rates on certain industrial and agricultural products, and to convert existing non-tariff measures (e.g. quotas and other quantitative restrictions) to tariffs on certain agricultural goods such as rice, corn, soybean, sugar, garlic, etc. The reduction of tariffs will lead to an influx of cheap, subsidized agricultural products into Thailand harming the interest of farmers who are the producers for the domestic market.

With regard to foreign investment and trade in services, Thailand has reformed its laws and regulations to comply with the Agreement on Trade-Related Investment Measures (TRIMS) of the WTO, which provides that WTO members may apply certain investment measures, such as performance and

local content requirements, but such measures must not become barriers to trade or distort trade. WTO Agreement on Trade in Services (GATS) does not oblige member states to liberalize their service market but to enter into negotiations with a view to liberalize service trade under the principle of progressive liberalization. Thailand has so far made commitments with respect to financial services, banking and insurance, and started liberalizing and amending the laws relating to those service sectors.

As far as the protection of IP rights is concerned, WTO/TRIPS Agreement requires significant reform of laws in many areas, along with substantially eliminating infringing activities of IP rights.¹¹ Like many other developing countries, Thailand had made great strides, before and after it became a member of the WTO, responding to unilateral demands from the United States. In 1989 and 1991, prior to the conclusion of the Uruguay Round of GATT talks, Thailand amended the laws to protect pharmaceutical patents, trademark and copyright protection of non-traditional subject matters, geographical indications, trade secret and layout-designs of integrated circuit.¹² The Thai government also made a lot of efforts to enforce the IP laws more vigorously. A number of cases of copyright and trademark infringement were successfully prosecuted, and the average penalties for such illegal practices have substantially increased.

The increased level of IP protection has allowed patent holders to charge excessive price for their products.¹³ Particularly, the increased level of protection of pharmaceutical patents has directly and indirectly increased the cost of medicines and restricting generic companies' ability to compete, thus obstructing the country's accessibility to essential medicines. In addition, the lack of institutional capacity for the rigorous assessment of the patentability requirements has led to the practice called 'patent-evergreening', thereby exacerbating the access-to-medicine problem.¹⁴ The 'patent-evergreening' refers to the strategy and practice employed by pharmaceutical companies to extend the length of their monopoly beyond the life of the original patent. For example, companies could file and obtain patents on new formulations, new combinations, new indications, new dosages or new usages of the original compound by claiming that the improvement would provide improved therapeutic value (e.g. being more effective against the disease with fewer side-effects than the original drug). This is

so despite the fact that the new forms of the drug may offer little or no advantage over existing medicines.¹⁵ Patents on a minor, incremental innovation can have a dramatic impact on access to medicines when they are used to block affordable generic products.

Thailand's experience with trying to provide access to drugs to its poor population highlights the difficulties the country faces when it has adopted strong IP laws but struggles to improve its capacity to implement such laws. In November 2006 and January 2007, the Thai Ministry of Public Health issued licences against patents over three medicines: (1) Efavirenz, Merck's anti-HIV drug (branded 'Stocrin'); (2) Lopinavir/Ritonavir (branded 'Kaletra'), an ARV distributed by Abbott Laboratories; and (3) Clopidogrel ('Plavix'), an anti-clotting drug sold by Sanofi-Aventis and Bristol-Myers Squibb. In fact, the patents for these drugs should not have been granted in the first place as some of these drugs do not meet the requirements for patentability. Lopinavir/Ritonavir or 'Kaletra' is a mere combination of two existing products, which should not be considered patentable "as it does not show a new and non-obvious synergistic effect".¹⁶

The patent on Clopidogrel or 'Plavix' is a composition of matter patent, which claims over the hydrogen sulfate salt of Clopidogrel or a polymorph. This form of invention would probably not be deemed a patentable invention because 'polymorphs are not invented but constitute an inherent property of chemical compounds'. In addition, the polymorph claim should not be considered as involving an inventive step as it is 'obvious for a pharmaceutical manufacturer to find the most suitable polymorph for any particular drug'.¹⁷ Unlike many developed countries, Thailand is unable to develop an efficient patent system. The Thai patent office does not possess sufficient capability to thoroughly conduct a proper substantial examination of patent applications.¹⁸ If the Thai patent office had the capability to properly test the novelty and inventive step requirements, there would be no need for the Thai government to grant a compulsory licence in order to improve access to medicines for its population.

In regard to the protection of plant varieties, Thailand has implemented Article 27.3(b) of the TRIPS Agreement by adopting a *sui generis* law. The Plant Variety Protection Act B.E. 2542 provides protection for not only new varieties of plants but also traditional varieties, local domestic varieties and wild

plant varieties. Under the current legal framework, Thailand can adapt and change the plant variety protection system to suit the local conditions in its agriculture and farming sectors. The developed countries have attempted, through bilateral trade negotiations, to limit this flexibility the country currently enjoys by requiring Thailand to implement the UPOV 1991 Act. The UPOV system will leave Thailand with few options regarding the scope of protection, as the 1991 Act provides the least discretion to the signatory states in choosing how to protect plant varieties.

According to Article 14 of the 1991 Act, the protection must be extended to all plant varieties. The exclusive rights must cover vegetative or reproductive propagating material, and extend to essentially derived varieties and harvested material. The rights of farmers to save, use, exchange, or sell farm-saved seeds are constrained. The full-scale monopoly rights will adversely affect the food and agricultural sectors, and adversely affect the interests of poor farmers, in particular when their right to save seeds is removed. Moreover, the accession to UPOV 1991 will prohibit the inclusion of provisions, which are currently enshrined under the plant variety protection law of Thailand, requiring applicants to prove that a plant variety is safe and does not cause any harmful effects to the environment.¹⁹

From the foregoing, it may be observed that while the strengthening of IP protection in the developed countries has been taken place in the context of legal systems with a solid tradition in the area of competition law and consumer protection,²⁰ in Thailand, as in many other developing countries, the laws protecting consumers and regulating competition in the market are extremely weak. The right holders are free to increase the price of the products protected by IP rights as they wish. The excessive and unregulated power given by IP rights have unnecessarily placed an additional burden on society and deprived the people right of access to essential products as Thailand's experience has shown. In addition, the policy of Thailand generally views trade liberalization as an end in itself, rather than as a mechanism that helps the country to achieve its national development goals. As a result, the country has paid very little attention to issues of how to improve its capacity for trade negotiations and how to promote a systematic development of the institutional capacity in order to efficiently implement the obligations it has under international trade agreements.

Non-Transparency in Trade Negotiations

While the 1980s and 1990s witnessed regime shifting for the intellectual property issue such as the move from WIPO to GATT/WTO, the 2000s has seen effort of some developed countries, particularly the United States and the European Union, to move intellectual property negotiations from the multilateral WTO system to regional and bilateral regimes. While negotiating a free trade agreement (FTA) with different countries, the US and the EU have requested their trade partners to provide more stringent intellectual property regimes than what is required in TRIPS (the so-called 'TRIPS-Plus'), in exchange for greater access for those countries' exports to US and EU markets. The United States, which is a major player in FTA negotiation, has so far signed 20 bilateral agreements with other countries. The first post-WTO FTA was the agreement the United States signed with Jordan in 2001. The most recent is the US-Korea FTA, which was signed in 2011. Most US FTAs contain similar provisions, which set out commitments beyond those currently established under WTO agreements. The rules and standards established by the bilateral and regional trade agreements will eventually serve as a model for expanding stronger trade commitments at the multilateral level.²¹

On patents and pharmaceuticals, US FTAs generally contain a chapter that provides for strong patent protection, which includes at least five key areas: (1) extension of patent coverage and restriction of the grounds for exclusion of patentability; (2) restraint of the use of compulsory licenses; (3) extension of patent term to compensate for unreasonable delays in granting the patent or for unreasonable curtailment of the patent term as a result of the marketing approval process; (4) accession to the Patent Cooperation Treaty; and (5) the provision of exclusivity protection for test and other relevant data submitted for market approval. Some of these provisions may have negative consequences for public health.²³ The TRIPS-plus provisions that the US have signed with its trade partners have introduced language that would make the compulsory licensing provisions difficult to apply, as it sets more stringent conditions than the TRIPS standards. The FTA between the US and Singapore, for example, confines circumstances under which compulsory licenses may be issued to three circumstances only, namely (1) to remedy anti-competitive practices,

(2) in the case of public non-commercial use, and (3) in the case of national emergency or other circumstances of extreme urgency.²⁴ It also prevents the country from issuing compulsory licenses in circumstances other than those mentioned above. For example, issuing a compulsory license on the ground of non-working or insufficient working of patents is prohibited, despite the fact that the use of compulsory licenses for local working of patents is the cornerstone of most countries' patent law and explicitly enshrined in the Paris Convention.

In addition, the US-Singapore FTA provides that a compulsory license may be issued to remedy an anti-competitive practice only after the patent holder has been adjudged by judicial or administrative process, under the competition law, as carrying out an anti-competitive practice.²⁵ This requirement would render compulsory licensing practically unworkable against anti-competitive behaviours, as the patent holders can challenge directly sovereign conducts that injures them, through judiciary or administrative channels. In practice, the countries that intended to use the compulsory licensing have always been under considerable economic pressure. With the adoption of the Doha Declaration on TRIPS and Public Health, it now seems obvious that WTO member countries can legitimately employ this legal mechanism to improve access to medicines. Since the TRIPS-plus commitments will further strengthen and prolong the patent monopoly, and contain ineffective provisions on compulsory licensing, revocation of patents and parallel import, the developing nations will have little room to make adjustments in the law to suit their particular needs.

It should be noted that the comprehensive understanding of the actual implications of non-multilateral trade agreements is generally lacking among the general public. This is largely because those trade agreements are negotiated in secret, behind closed doors. The FTA negotiating process of the US and the EU has been criticized for lacking openness and transparency. The trade negotiators of these two economic superpowers are mandated to negotiate trade deals in secret. They usually demand for a closed and secretive bilateral trade negotiation from their negotiating partners. Public access to draft agreement texts and other documents is restricted throughout the negotiation process. American and European public do not have knowledge about the details of the negotiations and are not aware of the proposals made by their government.

It may be noted that the United States uses a confidential trade advisory committee system, which consists of 28 trade advisory committees. These committees are largely dominated by industries. For example, the members of the Trade Advisory Committee on intellectual property rights are mostly the representatives of US major research-based pharmaceutical companies and entertainment industry. They are the only interested private parties that are allowed to access to and contribute comments on US proposals on IP matters.²⁵ The information that has been made publicly available is generally one-side information, coming mainly from the government and those private groups. Public demands in the United States have called for a system of transparency, collaboration and participation of broader interest groups in this public policy making. It was claimed that the closed-door policy not only prevented the vast majority of the public from fully comprehending the content of the negotiations, but also denied trade negotiators the opportunity to listen and exchange views with the public members.²⁶

The secret nature of the bilateral and regional negotiations is contrary to the more open and transparent practice adopted by the WTO and the WIPO in their multilateral negotiations. The two organizations generally make all country proposals available to the public as a formal part of the negotiation process. They from time to time publish updates on the status of negotiations that generates public debates regarding various aspects of the negotiated issues. Major developed countries are dissatisfied with the transparency in the norm-making process of the multilateral organizations. It was perhaps one of the reasons why those countries have shifted their policy towards pursuing bilateral trade.

The secrecy in trade negotiations allows the developed countries to establish acceptable higher trade standards. It also helps them to escape social movement attention and to avoid growing public opposition against international norm-making at the multilateral level.²⁷ As pointed out by Flynn *et al.*, '[T]he strategy appeared tailored to avoid an open debate over the standards being proposed in the agreement'.²⁸ The United States and the European Union are pushing for poor countries to accept trade issues that will have public interest implications, such as, threatening access to affordable generic medicines or generating environmental and resource depletion

effects. It is probably the main reason why US and EU trade negotiators are reluctant to reveal its negotiating position to the public.²⁹

In Thailand, the trade liberalization policy of the government has been subject to domestic criticisms for lack of transparency and for its unequal distribution of benefits between different interest groups. Like the US and the EU, Thailand generally carries out trade negotiations in secrecy. While the Thai government grants corporate lobby groups privileged access to its policy-making, it does not provide adequate avenues for consultation and participation of public-interest civil-society groups or stakeholders that would be highly affected by the proposed agreements. For example, it has never allowed civic groups, such as environmental, human rights and development organizations, NGOs working on HIV/AIDS, generic drug companies, farmer organisations, consumer associations and labour unions, to participate in formal and informal consultation meetings to which business people and trade councils are invited. Therefore, issues and proposals put forward for negotiation by Thailand are not carefully scrutinized by the potentially affected parties, and the decisions made by the government tend to be biased against grass roots and broader public interests.³⁰

There is also a lack of official information about what the potential effects of the trade agreements. The Thai government has not provided access to the draft negotiating texts in all relevant sectors, which creates difficulties for people to assess the impacts of the negotiations. Thailand's trading partners, particularly the United States and the European Union, usually demand the Thai government to keep the process of negotiation secret. An official negotiator attached to the Thai Ministry of Foreign Affairs publicly admitted that the Thai chief negotiator was requested by US trade negotiators to sign a confidential agreement prior to conducting FTA negotiations between the two countries.³¹

The non-transparency of trade negotiations was also reaffirmed by the Thai Senate Standing Committee on Foreign Affairs Economic, Commercial and Industrial Affairs. The Senate Committee conducted studies in regards to the impacts of trade liberalization and free trade agreements and in its report raised concerns over the non-transparent nature of the negotiations.³² In addition to negotiating in secrecy, the Thai

government always undertakes negotiations in a hasty manner without any clear view regarding the long-term impact of trade liberalization. Thailand's negotiating positions are largely determined based on an assessment of the competitiveness of the relevant sectors. No studies have been conducted by the Thai government about the social, cultural and environmental effects of free trade agreements. As a result, there is no clear governmental policy as to how the adverse effects of trade liberalization could be mitigated or lessened.

Thailand Advancing Transparency in Trade Negotiations

Currently, Thailand has been regarded an emerging economy, with solid growth during 2000 to 2012 averaging more than 4 % per year. In 2010, Thailand enjoyed total gross domestic product (GDP) of US\$ 580.3 billion. It is presently ASEAN's second largest economy after Indonesia. It has the fourth highest per capita GDP in ASEAN after Singapore, Brunei and Malaysia. Agriculture makes up 10.4 % of the country's GDP, industry 45.6 % and services 44 %. Thailand's major trading partners are the United States (10.9%), China (10.6%), and Japan (10.3%). The European Union, other ASEAN countries, Australia and New Zealand are also significant trading partners. Thailand has always enjoyed a substantial trade surplus. As the 2010 figure shows, its exports were worth US\$ 191.3 billion and imports were US\$ 156.9 billion. Primary destinations for Thai exports include the United States (10.9%), China (10.6%) and Japan (10.3%), and the major import partners are: Japan (18.7%), China (12.7%), Malaysia (6.4%), the United States (6.3%), United Arab Emirates (5%), Singapore (4.3%) and South Korea (4.1%).³³

Although the processes of globalization and trade liberalization have had a significant influence on Thailand's economic policy, recent years have seen a steep increase in the number of non-state actors or non-governmental organisations (NGOs). Along with the rapid growth of the national economy, there has been a rise in the concept of social and public interest and the increasing growth of NGO works in a wide range of political, social, economic and developmental issues.³⁴ NGOs represent the citizens' interests by building public participation and monitoring government projects. They have so far been very critical of the way the national development

and decision-making processes are made, particularly under the influence of corporate-led trade liberalization. Some NGOs in Thailand have focussed their works on the country's policy and positions in international trade negotiations. For example, they pressurized the Thai government to make use of the exception clause under Article 27.3(b) of the TRIPS Agreement that allows for the exclusion of animals, plants and biological processes from patentability. They successfully put pressure on the Department of Intellectual Property, that administrates the patent office, to not authorize patentability of transgenic animals or plants. The NGOs also exerted pressure on the government to support the international regime on access and benefit sharing of genetic resources proposed by a group of developing countries led by India and Brazil in the WTO. In its submission to WTO, Thailand supported the demand for an amendment to Article 29 of TRIPS that will incorporate into the TRIPS Agreement the principles of mandatory disclosure of origin, benefit sharing and prior informed consent. The Thai NGOs also had influence on Thailand's position on the protection of geographical indications. When negotiating on the WTO/TRIPS Agreement on protection of geographical indications, Thailand supported the extension of GI protection to other products than wines and spirits, due to the demand made by its civil-society groups.

In response to the plethora of non-multilateral trade agreements, an NGO group, called FTA Watch, was established in 2003. The group comprises academics, lawyers, environmentalists, social activists, trade unions, and other interest groups such as, the Alternative Agriculture Network, Thai Network of People Living with HIV/AIDS, and the Consumer Network amongst others. This group staged mass demonstrations against FTA negotiations between Thailand and its trading partners. They claimed that FTAs would generate socio-economic impacts on Thailand and demanded the Thai government to provide public access to information about the trade negotiations. Daniel Robinson of the University of New South Wales, who has spent many years observing the activities of Thailand's NGOs, pointed out that the Thai NGO network on FTAs is well-coordinated and has three primary activities: (1) advocacy work, (2) civic education, and (3) political lobbying.³⁵ The FTA-Watch group has done a successful job in raising public awareness regarding

to the implications of bilateral and regional trade negotiations. Because of their education campaign, the Thai public has increased understanding and concern about the consequences of liberalized trade and the development impact of the FTAs.

The political, social, economic, judicial and regulatory systems in Thailand were subjected to a substantial reorganization when the Constitution of the Kingdom of Thailand B.E. 2540 was promulgated in 1997. It was called the 'People's Constitution' as it was the first to be written by the assembly that was elected by popular vote.³⁶ The People's Constitution was introduced due to the political crisis in 1992 when the military-supported prime minister was forced to resign after the army suppressed a middle-class uprising. The incident led to a vigorous campaign for political reform and drafting a new constitution. Several NGO leaders were elected to the Constitution Drafting Assembly. They proposed constitutional requirements that promoted basic human rights, social welfare, educational opportunities, etc. The NGOs also made submissions addressing development issues, including environmental protection, land distribution, government support for agricultural production and distribution, and the community rights to manage natural resources.³⁷ When a military coup *d'état* was staged against the government of Thaksin Shinawatra on 19 September 2006, the Constitution was revoked. Although the People's Constitution was short-lived, it was considered the best constitution Thailand ever had, particularly when it laid down the criteria for transparency in trade negotiations.

The People's Constitution introduced checks and balances into the country's treaty-making system. Although the power to enter into treaties such as multilateral and non-multilateral trade agreements was vested in the government, the government was required to provide the public with access to the details of the negotiated treaty, prior to entering into negotiation. The government had to make available information relating to such a treaty and seek public opinions regarding the pros and cons of signing the treaty. It was also required to seek parliamentary approval for the treaty framework before it commenced the negotiation. After the treaty was concluded and the government had signed it, the treaty must be proposed for ratification by the Thai parliament in order to put it into force. The government must follow the aforementioned

procedures if the treaty negotiated falls into one of the following categories: (1) providing for a change in the national territories or the external territories that Thailand has sovereignty or jurisdiction over; (2) requiring a legislative enactment implementing the treaty; (3) having significant impact on Thailand's economic or social security; (4) having significant impact on trade and investment in the country. Finally, when the treaty that Thailand ratified would have major impacts and the potential to affect certain sectors, the government was required to provide remedies to those affected by the treaty in an expeditious, suitable, and fair manner.

Appraisal

At the early stage of Thailand's national development, public participation was not part of the planning and decision-making processes. Political power was controlled by State officials and the middle-class elites. External factors like globalisation and internationalisation have affected the country's decision-making and implementation on new development policies. However, since the political changes towards democracy in the late 1970s, the Thai government authorities have come to realise the significance of public participation in the national development process, and have included a cross section of civic groups in policy process. The appearance of the civil society sector has been one of the most striking political events in Thailand. It reflects not only the increased concern about the globalisation and its impacts on the economy, but also a transformation in Thailand's political economy which brought civic organisations and people networks closer together to represent rural demands.

Recently, governments of the developed countries have been under increasing pressure from their domestic industries to raise the standards of protection in foreign countries. The successful conclusion of the TRIPS Agreement has established a new era of intellectual property protection with multilateral rules and obligations that all WTO members must implement. But TRIPS is not the end of the patent harmonization saga. Developed countries and their allies are currently shifting negotiations seeking further harmonization outside WTO in bilateral, regional, and multilateral agreements. They have pushed for harmonization of patents towards the developed countries' model with the rules developed

in their own countries, such as the novelty and the inventive step requirements, and moved towards patent examination, and the weakening of provisions for compulsory licenses and working requirements. While these harmonized rules impose strong patent policies in a manner that is designed to protect developed countries' domestic industries, they may not suit the need to promote social welfare in developing countries.

The main feature of recent non-multilateral norm-setting activities under bilateral and regional trade agreements seems to be a complete lack of transparency during negotiations. Political power in negotiating such treaties has been in controlled by government officials and the TNCs. For the developing countries, external factors like the pressure exerted by their developed countries counterparts have significant influences on the way those countries conduct negotiations on a trade agreement. The movements of the civil society in Thailand are a classic civil struggle over the public's right to receive information. It also shows that the severe social and economic impacts resulting from the government processes, together with a growing public discontent with the lack of transparency and participation, could consolidate the people struggle for the right to know about the activities of their government.

If trade liberalization is to be a success leading to sustainable economic growth and ensuring the well-being of people, governments participating in trade negotiations have to decentralize their policy making by allowing public participation in the negotiating process. The following strategies should be taken in order to improve transparency: (1) providing the necessary means for various interest groups to become acquainted with international rules and norm setting procedures; (2) providing forums for public debate; (3) producing credible, objective policy studies; (4) making available to the public without delay draft agreements, policy documents, regulations, procedures and administrative rules of general application; (5) providing channels and opportunities for various parties to make observations and submissions about the trade issues that their government is involved in negotiations. Finally, the national constitution must provide for the parliament to have full power not only to make treaties but also to scrutinize socio-economic and other impacts of international trade agreements.

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